section 272, with the burden upon the BOC to explain how, if at all, the disparate treatment can be reconciled with the concerns of section 272 that competitive markets not be skewed by the entry of a BOC-affiliated entity.

The Notice also seeks to apply the Computer Inquiry III safeguards, including Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI") obligations.[43] The Commission is no doubt aware that these obligations have borne little fruit for enhanced service providers, and the initial intent to fully unbundle network functionalities for such firms has been less than successful. Nevertheless, Time Warner believes that, if coupled with a separation requirement, these safeguards may prove useful to information service providers. Time Warner thus supports the Notice's proposal to maintain them.

C. The Commission Should Act to Limit the Anticompetitive Opportunities Inherent in Joint Marketing.

The possible joint marketing of local exchange services with competitive services provides a BOC with critical opportunities to leverage its monopoly power into competitive markets and thereby distort competition in those markets. The Commission should use extreme care in crafting rules that would allow joint marketing.

The first step a person takes when moving to a new residence is to order phone service for that new residence. In the case of businesses, it may even be that phone service is effectively ordered before the location of the business has been identified

---

[43] Notice at ¶¶ 48-50.

-- where a particular phone number is desired or where the billing address is certain but the new location is not yet established. The historical monopoly position of the BOCs necessarily means that, even after competition is introduced into the local telephone business, new users (either subscribers new to the area or those moving within the same general service area) will tend to call the BOC before any other service provider.

This advantage cannot be overstated. Especially in light of trends toward increasing personal mobility and business volatility, in many areas of the country the BOC will be the first ones called by up to 35% of the target market for customers.[44] This unique window controlled by the BOC must not be permitted to be exploited to the detriment of competition.

The statute allows BOCs to jointly market their monopoly services with interLATA services upon being granted interLATA relief in a given state. The FCC should read this authority narrowly. For example, the BOC should not be allowed to engage in national or regional advertising or marketing where the reach of the message would exceed the particular state in which relief has been granted. Only localized advertising should be permitted, such as local spot advertising or local newspapers or mailings, until and unless regional relief has been justified by

---

[44] See U.S. Dep't of Commerce, Stat. Abstract of the U.S. 1994 at 31 (Thirty-five percent of 20-24 year-olds in the United States moved to a different house in the United States between 1991 and 1994; seventeen percent of the American population as a whole moved to a different house in the United States between 1991 and 1994). In addition, in the decade between 1982 and 1992, over 600,000 new businesses were incorporated annually in the United States. Id. at 547.

the RBOC in every one of its states.[45] Also, as the Notice correctly observes, joint marketing must not be done in any manner that violates the sharing prohibitions of section 272. Not only must outside firms be employed to market or advertise the services jointly, in order to preclude shared employees, but the financial costs of such third party services must be shared equally, that is, proportionate to the actual number of services being marketed. Absent such a requirement, the BOCs will attempt to allocate most of the costs of marketing onto the ratepayer by applying some contrived allocator, such as gross revenues earned by the services. This would be wholly inappropriate given the near-monopoly status of the BOC in local exchange even post-section 271 relief.

Further, the Commission correctly notes that section 272 cannot be read in a vacuum but must be read in conjunction with the stricter limitations on joint marketing contained in section 274. Thus, where a BOC engages in both electronic publishing as well as some form of interLATA service, the requirements of section 274 -- rather than those contained in section 272 -- must control.[46]

---

[45] Consider especially the opportunities for statutory evasion in the context of the merger of two RBOCs; absent such a constraint, Bell Atlantic and NYNEX could market up and down the entire Northeast long before the merged entity had obtained relief in most of the relevant states.

[46] The same is true for all other protections prescribed by section 274 but not by section 272, such as those precluding BOC provision to the separate affiliate of hiring and training of personnel, purchasing, installation or maintenance of equipment, or performing research and development. See 47 U.S.C. § 274(b)(7).

The joint marketing activity allowed under either section 272 or section 274 must be consistent with new section 222, governing the use of customer proprietary network information and subscriber list information. As tentatively construed by the Commission in its Notice of Proposed Rulemaking, section 222 precludes, absent prior customer authorization, the use of CPNI gained by carriers in their provision of one carrier service for the purpose of conducting any other business.[47] That Notice also discusses the need to ensure that subscriber list information is available on a nondiscriminatory basis.

The Commission should clarify in this proceeding that the joint marketing activities permitted to BOCs under section 272 nevertheless remain subject to the requirements of section 222. Thus, any joint marketing under section 272 must not use CPNI in the possession of the BOC, and any subscriber list information must be available on nondiscriminatory terms.

While section 271(e) transitionally limits joint marketing by the top three interexchange carriers where their local services are provided only through resale of the local exchange monopoly, its application should be read narrowly. It does not apply to independent local exchange competitors such as Time Warner, or to any joint marketing arrangements it may enter into with any IXC. Nor does it apply if an IXC jointly markets its

---

47 Implementation of the Telecommunications Act of 1996, Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, Notice of Proposed Rulemaking, at ¶¶ 23, 26 (released May 17, 1996).

interLATA services and local services it provides by reselling competitive local network services such as Time Warner's.

V. THE SEPARATIONS RULES MUST ACCOUNT FOR RELATED COMPETITIVE ACTIVITIES BEYOND THOSE ENUMERATED IN SECTION 272.

As described earlier, although only certain enumerated activities are set out for separation under the terms of section 272, the 1996 Act reflects a broader set of concerns for BOC misconduct in other competitive markets. Congress has expressly directed that "the Commission shall ensure that the provision of [incidental interLATA services] by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."[48] And section 254(k) even more broadly commands that a carrier "may not use services that are not competitive to subsidize services that are subject to competition."[49] The FCC cannot therefore ignore the possible anticompetitive harms that might befall other competitive markets.

The legislative mandate for independent operations also requires the Commission to be mindful of other BOC activities, beyond those conducted by the local exchange carrier and by the separate affiliate, that might serve as a vehicle for BOC circumvention of the separations rules. The parent holding company is one obvious opportunity for the BOC to funnel impermissible transactions or monies between the monopoly side and the separate affiliate. Thus, the Commission must make clear

---

48 47 U.S.C. § 271(h).

49 Id. at 254(k).

that the BOC cannot do indirectly, through the holding company or other corporate affiliates, what it cannot do directly. For example, any officer, director, or employee common to both the holding company and the separate affiliate cannot also hold a position with any local exchange carrier. Similarly, as discussed earlier, sharing of services cannot occur "through" the holding company or other affiliates.[50]

The Commission must consider carefully the commercial context in which the protected information services are likely to be provided. Very few of these will be true "stand-alone" products or services; rather, they will very likely be offered, as they are today by independent firms, in conjunction with other goods and services that are outside of the explicit separations requirements of section 272.

The Notice of Proposed Rulemaking in CC Docket No. 96-152, to develop rules for telemessaging, electronic publishing and alarm services, correctly observes, for example, that information services and electronic publishing might likely be offered together.[51] Of critical competitive significance to Time Warner is the fact that both information services and electronic

---

50 The Commission's authority to reach a Bell holding company when necessary to address matters of regulatory concern with respect to that holding company's common carrier subsidiaries is well-established. See North American Telecommunications Assn. v. FCC, 772 F.2d 1282, 1292-93 (7th Cir. 1985).

51 Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services, CC Docket No. 96-152, Notice of Proposed Rulemaking, at ¶ 48 (released July 18, 1996).

publishing services are likely to be jointly produced, distributed and/or marketed with a third set of services: video programming. While neither section 272 nor section 274 expressly provides for integrated offerings of video with these services, the Commission's separations requirements cannot ignore this commercial likelihood.

The operational independence of information service offerings and electronic publishing will be undermined if the BOC is permitted to commingle video offerings and basic telephone services, on the one hand, while simultaneously commingling video offerings with information services and/or electronic publishing services. The separations requirements of section 272 (and section 274) would be utterly negated; BOC video businesses could create a hopelessly large hole in the firewall that Congress intended to erect in enacting these sections.

A. The Likelihood Exists that Video Operations and Information Services or Electronic Publishing Will Be Offered Jointly.

While the Act may not require a separate affiliate for the provision of full motion video,[52] by itself, the distinction between full motion video and information services or electronic publishing is unclear and, over time, may defy distinction. More significantly, there exists a natural affinity between the provision of video and the provision of information services and electronic publishing. This has been the experience of the cable television industry. For example, Time Warner intends to market

---

52 "Full motion video," as used herein, is synonymous with "video programming" as defined in section 610(20) of the Act.

its cable modem service with its core cable video services. In addition, it is fair to assume that the joint marketing or provision of interactive games or electronic shopping with video is a natural pairing. Commercial reality suggests that at least some information services and electronic publishing will be produced, marketed, or distributed jointly with BOC video services.

Technological development and innovation, as well as the incentive to avoid separate affiliate requirements, may blur the lines between information services and electronic publishing on one hand, and full motion video on the other. In short, the natural pairing of video services with information services or electronic publishing creates an incentive to offer them jointly while increasing the difficulty of distinguishing them from one another.

B. The Potential for the Joint Provision of Video and InterLATA Information Services or Electronic Publishing Must be Accounted for in Crafting the Structural Safeguards.

The similarity and affinity between video services on the one hand and information services and electronic publishing on the other must be accounted for in implementing the separation requirements contained in sections 272 and 274.

The Notice proposes to prevent the attempts of BOCs to avoid Commission regulation through the establishment of affiliates for the joint provision of local and interLATA services.[53] Time

---

[53] See Notice at ¶ 79 ("we tentatively conclude that Congress did not intend for a BOC to be able to move its

Warner supports the Commission's tentative conclusion and believes that its logical extension requires steps to prevent BOC circumvention of regulation through the use of an unseparated video affiliate to jointly provision video services, local telephone services, and information services or electronic publishing.

The Commission can readily foreclose evasion of the Act's independent operation requirements (and the consequent anticompetitive effects) by requiring the BOC to choose to either produce, market and provide its video services with its telephone services or with its information services, but not both. If a BOC decides to integrate some part of its information service activities with its video operations, be it through production, distribution or marketing, it should be required to do so through the separate affiliate required for information services. If a BOC desires to jointly produce, provide or market telephone services with its video services, then both its telephone and its video services must be separated from the section 272 separate affiliate.

Both the joint provision of telephony and video and the joint provision of video and information services or electronic publishing may offer the benefits of scope economies. Under Time Warner's proposal, the BOCs would have a choice as to which route offers the greater benefits. Specifically, BOCs would be able to offer jointly telephony and video insofar as those operations

---

incumbent local exchange operations to an affiliate in order to avoid complying with section 272(c)").

remain separate from a BOC affiliate's provision of information services or electronic publishing. However, the BOCs could decide to offer jointly video services and information services or electronic publishing through an affiliate separate from their LEC operations. But it must not be permitted to circumvent the separations requirements through the device of a third affiliate, unchecked by the safeguards set forth in sections 272 and 274.

Similarly, a BOC should be allowed to jointly market information services and electronic publishing services in a single affiliate. If it chooses to do so, however, the competitive affiliate must be separated pursuant to the more stringent provisions of section 274. No less is required by the statute itself, since any other result would allow the BOC to evade section 274.[54]

Where a BOC provides video services in common with interLATA information services through an Open Video System ("OVS"), there is already drawn within the OVS regulatory framework a natural division between the OVS operator, controlling the transmission facilities, and the OVS programmer affiliated with the BOC. Requiring separation between the OVS facilities and transmission capability, on the one hand, and OVS programming and other content services falling within the definitions of information services and/or electronic publishing, on the other hand, is thus

---

54 Section 274 prohibits a BOC "or any affiliate" from engaging in electronic publishing, except through a separated affiliate that meets the requirements of 274. 47 U.S.C. § 272(a). The phrase "or any affiliate" quite clearly would encompass a section 272 separate affiliate.

consistent with both the regulatory framework and commercial realities. In the case of BOC provision of video services via a traditional cable system, however, separation of programming and other content from transmission would be far more problematic. Thus, in the special case of BOC cable systems, an exception should be allowed for the separate affiliate to own transmission capabilities, provided that they are not integrated with the local telephone network. Moreover, because telephone companies building cable systems are largely doing so without integrating the cable networks with their local exchange facilities, separation at this specialized line should not disturb Congress' will to isolate the local exchange facilities from other activities more open to competition.

C. The Structural Safeguards Would Be Consistent with the OVS Order and the 1996 Act.

The Commission addressed the issue of separate affiliate requirements for OVS in its recently released OVS Order.[55] In its comments in that proceeding, Time Warner indicated its strong belief that the Commission should impose a separate subsidiary requirement for LEC provision of video services. Time Warner remains steadfast in this belief. However, the Commission declined to impose a separate affiliate requirement on the LEC OVS.[56] This decision resulted from the Commission's determination that "[s]ection 272 exempts 'incidental interLATA

---

[55] Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, CS Docket No. 96-46, Second Report and Order, (released June 3, 1996)("OVS Order").

[56] Id. at 125-126, ¶ 249.

services' from the separate affiliate requirement, and includes certain video programming services within the definition of 'incidental interLATA services' described in Section 271(g)."[57]

Time Warner herein proposes a method for effectively implementing the statutory mandate to separate BOC information services and electronic publishing operations from its local exchange services. In its OVS Order, the Commission noted that "[s]ection 653 is silent on whether LECs and others must provide open video service through a separate affiliate."[58] The statute is not silent with respect to separation of information services and electronic publishing. Hence, the Commission can and should implement the separation proposal contained herein as consistent with the explicit terms of the 1996 Act.

The application of the separate affiliate requirements proposed herein would provide structural safeguards against the evasion of regulatory controls by diminishing the opportunities for abuse without imposing unnecessary burdens on the enforcement resources of the Commission or unnecessarily endangering local ratepayers. Further, the safeguards proposed herein would permit BOCs to avail themselves of any scope economies while promoting competition in the provision of information services and electronic publishing.

---

57 Id.

58 Id.

VI. PROCEDURES FOR COMPLAINTS ALLEGING A FAILURE TO MAINTAIN COMPLIANCE WITH THE TERMS OF A BOC'S IN-REGION INTERLATA ENTRY SHOULD FACILITATE PROMPT RESOLUTION AND REMEDIES.

Section 271(d)(6) of the 1996 Act authorizes the Commission to enforce the interLATA entry requirements of section 271 either in response to a complaint or on its own motion.[59] Absent agreement of the parties to the contrary, the Commission has 90 days in which to act upon the complaint.[60] With regard to this enforcement obligation, the Commission seeks comment on a variety of issues. Time Warner limits its comments to three crucial issues: (1) the standing of local telephone competitors to file complaints under section 271(d)(6); (2) the required showing to establish a prima facie case;[61] and (3) the proper placement of the burden of proof.[62]

The first issue, standing, is not raised in the Notice. However, the Commission should clarify that parties seeking to compete with a BOC for local telephone customers have standing to file complaints under section 271(d)(6). A party should be deemed to be "seeking to compete" with a BOC where the party has demonstrated an intent to enter the local telephone market. For example, such intent could be demonstrated by filing an application for state certification, or initiating negotiations with a BOC for interconnection. In light of the discussion in section II, supra, it is readily apparent that regulation of BOC

---

59 47 U.S.C. § 271(d)(6).

60 Id. at § 271(d)(6)(B).

61 Notice at ¶ 100.

62 Id. at ¶¶ 101-104.

entry into the interLATA market is just as important to local loop competitors as it is to long distance competitors. Both sets of competitors, as well as other interested parties[63] should have standing to seek redress of BOC competitive checklist malfeasance.

The second issue, the standard for finding the existence of a prima facie case, also is important to effective complaint procedures. The standard for initiating a complaint should not be so onerous as to deter complainants from seeking legitimate redress from the Commission. This is especially important given the fact that "although the 1996 Act requires incumbent LECs. . . to provide interconnection and access to unbundled elements on rates, terms, and conditions that are just, reasonable and nondiscriminatory, incumbent LECs have strong incentives to resist such obligations."[64] Once interLATA entry is achieved, in the absence of adequate complaint procedures, ILECs will have nothing to lose by engaging in discrimination and other prohibited conduct; new entrants simply have "nothing that the incumbent needs to compete with the entrant."[65] For these reasons, the Commission should require that complainants "plead, along with supporting evidence, facts which, if true, are

---

[63] Other parties may include consumers, competitors in other related markets, including interLATA information services and manufacturers, video programming distributors where the BOC has provided video in conjunction with any of the services covered by section 272, state regulators, and others. Of course, the Commission has the statutory authority to commence remedial proceedings sua sponte.

[64] Interconnection Order at ¶ 55.

[65] Id. at ¶ 134.

sufficient to constitute a violation of the Act or Commission order or regulation,"[66] in order to establish a prima facie case. This will require that complainants provide sufficient facts and evidence to allow the BOC the opportunity to make its case that no violation has occurred.

In the context of complaints seeking specific performance on the part of the defendant BOC, the Commission should, in effect, adopt a strict liability standard. Any complaint showing that a BOC has failed to provision interconnection or related services on a timely, reliable basis should plainly not be required to show that the non-performance was due to anticompetitive intent. Rather, it should suffice to show the non-compliance itself. Redress through specific performance should be available regardless of whether the BOC intended (generally or specifically) harm to the competitor.

The third issue, the proper placement of the burden of proof,[67] should be resolved by placing the burden of proof on the BOC once the complainant has established a prima facie case. In effect, establishing a prima facie case should give rise to a presumption that the BOC in question is culpable of the actions alleged in the complaint. The BOC would then bear the burden of rebutting the presumption at pain of a finding of liability. Failure to produce evidence rebutting the presumption should entitle the complainant to the relief sought.

---

66 Notice at ¶ 100.

67 Id. at ¶¶ 101-104.

As noted by the Commission, placing the burden of proof on the BOC in this manner is appropriate for the following reasons. First, the Commission has already imposed the burden of proof on ILECs seeking to treat one carrier differently than another.[68] In that situation, ILECs must prove to the state commission that differential treatment is cost-justified.[69] Similarly, utilities bear the burden of justifying denial of pole and conduit access to a cable television operator or telecommunications carrier.[70] ILECs are, in essence, a utility possessed of a societal necessity -- the ubiquitous public switched telephone network. Complaint procedures must be cognizant of this special status.

Moreover, in many cases the BOC will be in sole possession of the information necessary to resolve the dispute.[71] Placing the burden of proof on the BOC will give it every reason to produce the information necessary to resolve the complaint in a timely fashion, because failure to produce the information will result in a finding of liability by the Commission. Shifting the burden of proof effectively will reduce the need for protracted discovery requiring more than 90 days to resolve the complaint and will conserve the resources of the complainant, the defendant BOC, and the Commission. Second, shifting the burden of proof on the BOC will reduce the complainant's burden and thereby

---

68 Interconnection Order at ¶ 1317.

69 Id.

70 Id. at ¶ 1222 ("utilities have the ultimate burden of proof in denial-of-access cases").

71 Notice at ¶ 102.

facilitate the detection of unlawful behavior by the BOCs.[72] In effect, complainants will act as "private attorneys general" assisting the Commission in policing the requirements of the statute.

VII. BOCS SHOULD NOT BE REGULATED AS NONDOMINANT UNTIL COMPETITION IS ESTABLISHED IN THE BOC'S LOCAL TELEPHONE SERVICE AREA.

Time Warner believes that the BOCs' affiliates will possess market power in the in-region interLATA telephone market because of their ties to the BOCs' local telephone bottleneck. No degree of separation can alone ensure that this tie will be effectively severed. Rather, the bottleneck itself must be eliminated or at least substantially weakened. Time Warner therefore believes that the Commission should impose and retain dominant regulation of BOCs' in-region interLATA services until such time as competition in the local telephone market is observably sustained over a substantial period of time.

Imposition of dominant regulation will serve two purposes. First, dominant regulation, particularly the tariff requirement, will provide a means of monitoring BOC compliance with the statutory obligation to charge affiliates rates equal to those charged unaffiliated interexchange carriers for telephone exchange service and exchange access.[73] Absent rate supervision, the Commission will be unable to effectively monitor compliance with this imputation requirement. Second, retaining dominant

---

72 Id.

73 47 U.S.C. § 272(e)(3).

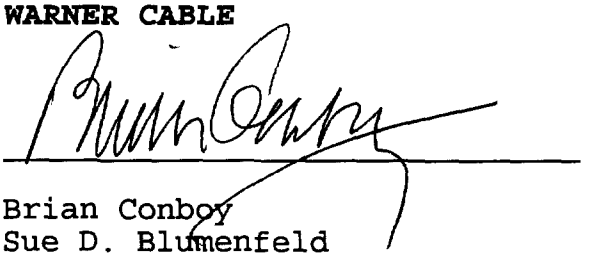
treatment until a BOC is subject to robust and sustained local telephone competition will provide an additional, ongoing incentive for BOCs to remain in compliance with the section 271 checklist, even after the BOC has obtained authorization to enter the interLATA market. Reclassification to non-dominant status may be thereafter appropriate once competitive alternatives have proved to provide sufficient check on BOC anticompetitive conduct. For the reasons described above, providing BOCs positive incentives to cooperate will be far more effective than after-the-fact, punitive measures for the purpose of promoting competition in local telephony.

VIII. CONCLUSION

For the reasons set forth above, the Commission should take the following actions in this proceeding: (1) grant BOC interLATA authority only when the section 271 checklist is met and the local bottleneck is demonstrably broken; (2) fully implement the separations requirements of section 272; (3) require that BOC video offerings be provided either on the telephone side of the business or on the separate affiliate side; (4) adopt complaint procedures that encourage complainants to seek redress of BOC noncompliance with their section 251 and 271 obligations; and (5) regulate BOCs as dominant in the interLATA telecommunications markets until the local telephone market is demonstrably competitive.

Respectfully submitted,

TIME WARNER CABLE

By: 

Brian Conboy
Sue D. Blumenfeld
Michael G. Jones
Gunnar D. Halley

WILLKIE FARR & GALLAGHER
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20036

ITS ATTORNEYS

15 August 1996

CERTIFICATE OF SERVICE

I, Catherine DeAngelis, do hereby certify that on this 15th day of August, 1996, copies of the foregoing "Comments of Time Warner Cable" were hand delivered to the following parties:

The Honorable Reed E. Hundt, Chairman
Federal Communications Commission
1919 M Street, N.W. -- Room 814
Washington, D.C. 20554

The Honorable Rachelle B. Chong, Commissioner
Federal Communications Commission
1919 M Street, N.W. -- Room 844
Washington, D.C. 20554

The Honorable Susan Ness, Commissioner
Federal Communications Commission
1919 M Street, N.W. -- Room 832
Washington, D.C. 20554

The Honorable James H. Quello, Commissioner
Federal Communications Commission
1919 M Street, N.W. -- Room 802
Washington, D.C. 20554

Regina M. Keeney, Chief
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 500
Washington, DC 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 544
Washington, DC 20554

International Transcription Services, Inc.
2100 M Street, N.W.
Suite 140
Washington, DC 20037

Catherine M. DeAngelis
Catherine DeAngelis